



TITLE  
ASSOCIATION

EXHIBIT 2  
DATE 3-18-09  
HB 647

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To: Members of the House Taxation Committee

From: Members Montana Land Title Association (MLTA) Legislative Committee

Re: Opposition to HB 647 – support for SB 181

**Summary:**

During the 2005 and 2007 Legislative Sessions the Montana Land Title Association opposed legislation by the Montana Department of Revenue (DOR) to enact a "non-resident withholding tax" similar to HB 647 that is now before the 2009 Legislature. If adopted HB 647 would enact a 2.5% withholding tax on most closings involving non-residents with the stated purpose of making sure non-resident sellers pay capital gains taxes associated with the sale of their property. Unfortunately, closing agents would become the ones responsible for collecting the withholding tax which they would then remit to the DOR.

**The MLTA Opposes HB 647 and Supports SB 181 as a better alternative for these key reasons:**

1. MLTA supports SB 181 to reinstate the filing of IRS 1099 forms with the DOR instead of establishing a new withholding tax. We believe the DOR can more efficiently use information from 1099s to cross-check for tax compliance. After all, the IRS has efficiently used this process for years. SB181 was overwhelmingly passed by both the Senate and House and sent to the Governor on March 9, 2009.

The MLTA supports SB 181 as a viable alternative to various efforts of the DOR to implement a withholding tax from real estate closings. Rather than assume every deed that is recorded could be a taxable transaction by reviewing every single Realty Transfer Certificate, **1099 data is exactly what the DOR needs** to find residents and non-residents alike that have had a real estate transaction wherein a tax return is required to be filed. Everyone regardless of residency needs to pay their taxes.

2. Even though the tax will only be on non-residents, the law requires closing agents to verify who is and who is not a resident at all closings which will increase the time and expense of all closings. This in turn increases closing costs and fees to Montana residents. We disagree with the DOR that the determination of non-residency will be a "self-executing" form done by the customer.

Just like the Realty Transfer Certificate, we know most people will not fill out the form without help or will not fill it out unless we provide and make sure it is done. Again this will take additional time, effort and money because EVERYONE will need to fill out an additional form showing whether or not they are a resident. It is likely the first time a seller will look at the residency form will be at the closing table. If that seller is honest and turns out to be a non-resident, what if there is not 2.5% cash available because the parties did not plan for it? That sale will likely be blown and the seller will be lucky not be sued by the buyer for failure to close.

MLTA does not support our industry being the only private industry faced with daily enforcement of tax laws. MLTA believes the enforcement of tax laws is the responsibility of the Internal Revenue Service and the Montana Department of Revenue. Placing this burden squarely on the shoulders of MLTA Members is unfair and will significantly decrease the efficient processing of real estate transactions.

3. MLTA continues to support, develop and circulate educational materials for our members to use during closings to remind individuals about their tax obligations.

4. MLTA opposes and questions the integrity of the DOR's "RTC Review Program" conducted during 2008 in which they collected questionable information to justify their support for a withholding tax. FYI, the DOR spent over \$750,000 in taxpayer money to conduct the RTC Review Program. Unfortunately the DOR's RTC Program does not accurately account for non-taxable transactions and assumes all RTCs represent a taxable transaction. The RTC project wastes valuable resources by guessing which transactions may be taxable and needlessly sends out numerous letters asking people if their transaction was taxable. Resources would be saved by using the 1099s to cross-check against who filed a tax return and target just those people.

5. MLTA has conducted their own "non-resident tax compliance reviews" recently and found the data we collected from actual closing demonstrates that the potential non-resident transactions with sales proceeds of over \$100,000 to be less than 5% of the total sellers reported on 1099s. And, out of that 5% not every out of state resident who sells MT property will have a gain or is required to file a MT tax return. The DOR data ignores all types of transactions which are non-taxable.

Using the DOR's out of state non-compliance figures, the DOR says approximately 30% of "non-residents" do not pay the required tax. MLTA's data indicates only 5% of transactions over \$100K COULD have an "out of state resident." **We've tried, but simply cannot make sense of the Department's conclusions from its data because it does not conform to primary data we see from 1099s and the recorded documents themselves.**

So for a very small number of transactions all Montanans will need to pay higher fees and costs and take more time at closings because resident or not this law will require every seller to fill out more forms. The bill unfairly targets the majority of honest tax paying individuals to catch a few.

6. MLTA does not support letting non-residents off the hook. But, neither does MLTA support letting residents off the tax hook. The RTC data does show there are plenty of Montanans not paying their tax (and in fact, the RTC data shows the Department has not focused on Montanans.) If the Department would just use our 1099s to cross-check against who filed tax returns it could pinpoint all taxpayers who likely should have paid tax rather than shooting in the dark. The 1099s contain all the information needed whereas an RTC does not.

7. Below is a list of flaws contained in HB 647 legislation itself. If any legislator is considering voting for HB 647, then please review the attached list before voting in favor of the bill.

### **Montana Land Title Association Technical Comments on HB 647**

1. Section 4; "Withholding - application not required" -

a) This provision only has **two** of the same exemptions as on the Realty Transfer Cert. **The RTC has 15 exceptions to a sales transactions**, including the two in HB 647 (Tax/Sheriff's Deed; and Foreclosure).

b) The remainder of the exceptions on the RTC are not listed in HB 647; in other words, the DOR is saying the Sales Price information is not applicable for many other types of transactions, yet in HB 647 all these same "transactions" require cash withholding when none is available. Additionally, the transferor will needlessly be required to fill out another form to duplicate information provided on the RTC.

c) There is no exception for true "sale" transactions where no cash is available such as - Short Sales; Contract for Deed, Seller carry backs, Deeds in Escrow. The DOR needs to understand that in these cases sales will likely fall through at a time when the last thing the economy needs is money further frozen from changing hands. If a seller does not have the cash and/or has to go through a pre-approval process, the sale will likely fall through due to the waiting time involved for the seller to raise case or wait for pre-approval.

d) Section 4, page 2, line 29; -exception for pass through entity of disregarded entity. This provision gives a pass to an LLC or other pass through organization. The proposed law has individuals in the crosshairs, which conflicts with 1099 reporting for pass through entities. If an individual transfer's property into an LLC and then sells, they are exempt from withholding, even though a 1099 will be issued. 1099s are issued for LLCs and partnerships. By excluding them from HB647 a non-resident cheat can easily form an LLC prior to closing to avoid the tax.

2. Section 5, page 3, Reporting and remittance. Section 2 says the transferor shall file report and remit within 5 days of closing. Section 3 says a copy of report **and copy of payment MUST be attached to RTC. Which is it?**

Report/remit after closing, or provide the check with Deed? Obviously, payment before the deed records is problematic because a transaction is not closed until the deed is recorded. What if payment is made and the buyer backs out? Lender funds cannot be disbursed until **after** their lien instrument is recorded, therefore no money is available at the time of recording.

3. Section 5, Sub. 4. "DOR may not change ownership records.." The issue of proper tax payment has nothing to do with the validity of the deed being recorded and its resulting change of ownership records. This provision only penalizes a buyer who has nothing to do with the tax issues of the transferor/seller. **This provision puts the burden of this law on a Good Faith Purchaser for Value Without Notice. An innocent buyer may end up being delinquent on taxes because of some seller failure on the seller's withholding tax.**

4. Section 4, Sub 3(f): Pass-Through Entity: Exempting Montana formed corporations and pass-through entities (LLCs and Partnerships), raises several problems:

4.1. The IRS 1099s do not exempt LLCs and Partnerships.

4.2. Tax cheats can easily get around the withholding by forming a Montana LLC right before the sale. (By cross-checking 1099s, you will catch even those who formed an LLC prior to sale.)

4.3. What about those entities who are based solely in Montana but have used another state to incorporate (e.g., Delaware) or to form their LLC (e.g., Wyoming)? There are lots of Montana businesses who do business no where else who are going to suddenly be subject to this law simply because they legally chose another state to form their business.